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Nos. 76-1114,
76-1133 and 76-1587

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

CALIFORNIA, *et al.*,

Petitioners,

v.

SOUTHLAND ROYALTY CO., *et al.*,

Respondents

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

OBJECTIONS OF RESPONDENTS TO MOTIONS OF ASSOCIATED GAS DISTRIBUTORS AND NEW YORK PUBLIC SERVICE COMMISSION FOR LEAVE TO FILE AMICUS BRIEFS

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Pursuant to Rules 35 and 42, Respondents Southland Royalty Company, et al.[1] object to and respectfully urge the Court to deny the motions of the Associated Gas Distributors (AGD) and the Public Service Commission of New York (Service Commission) for leave to file briefs *amicus curiae* in this proceeding. We object on two grounds.

[1] These objections are filed on behalf of the Southland Royalty Company, the trustees under the will of Warren Wright, the Penn interests, Exxon Corporation and Texaco Inc.

1.

First, AGD and Service Commission each allege that the decision of the court of appeals would permit respondents, owners of revisionary interests in acreage formerly subject to 50-year fixed term leases which expired by their terms, to "*withdraw* substantial quantities of gas . . . from the service" in interstate commerce being conducted by the fixed-term lessee. (Service Commission, Motion at p. 2, emphasis added; *see* AGD brief at p. 8, which uses "divert" in a similar fashion).

This deliberately begs the question presented: whether the lessee, Gulf Oil Corporation, ever had and exercised the legal power to dedicate to interstate commerce not only the gas it owned pursuant to its lease, but also the gas that might be produced by the respondents after the expiration of Gulf's lease. If, as the court below held, Gulf lacked this power, respondents' gas has *never* been dedicated to interstate service. If respondents' gas was never dedicated to interstate service by Gulf, it is not being "withdrawn" or "diverted" by respondents.

2.

Second, AGD and Service Commission both contend that although this case involves the expiration of a fifty-year fixed-term lease, the decision below "is not limited" to cases involving leases of this now-extinct type (AGD Brief at p. 8), but has "far greater implications" (Service Commission Motion at p. 2). In support of this conclusory allegation AGD and Service Commission hypothesize a variety of fact situations in which the "approach advanced by the court below" (AGD Brief at p. 9) would supposedly be in derogation of the Natural Gas Act.

None of these hypotheses is supportable on the record in this case. None was relied on by the agency in the orders under review and thus none can be advanced to sustain its orders on appeal. *FPC* v. *Texaco Inc.*, 417 U.S. 380 (1974). Each was offered unsuccessfully by the petitioners to the court below. Each is contained in the briefs of the two petitioners who have timely filed briefs on the merits in this Court, and presumably will be found as well in the

brief of the Federal Power Commission, which was due on August 31, 1977, but has not yet been filed.

Two of these arguments from hypotheticals are particularly objectionable. AGD says that the decision below will lead to lessors insisting on short fixed-term leases, so that although the lessee can begin interstate sales, after termination the lessor can "reassess the relative burdens and benefits of interstate deliveries" (AGD Brief at p. 9). This argument overlooks one of the most elementary facts of the gas producing industry — the ordinary producer's lease is the basis of his investment in drilling. Thus, no producer would accept a short fixed-term lease because it would deprive him of his opportunity to recover his investment, by prematurely terminating his right to produce and sell what he finds. This is why the ordinary oil and gas lease continues for "so long . . . as production continues in paying quantities." It also overlooks the Federal Power Commission's ability under Section 7 of the Natural Gas Act, 15 U.S.C. § 717f, to refuse to certificate the lessee's sale of gas attributable to such hypothetical leases or to impose on the certificate whatever conditions it finds necessary to protect the public interest.

Service Commission says that the present case has implications for cases in which the lessor exercises a voluntary power to terminate, and both Service Commission and AGD give *Phillips Petroleum Co.* v. *FPC*, 556 F.2d 466 (10th Cir. 1977), as an example. Unlike *Phillips*, the present case does *not* involve a voluntary termination; the lessee's lease terminated by operation of law. *Phillips*, moreover, involved an attempt to take a portion of the gas attributable to the *same* leasehold interest from which the lessee had commenced interstate service and make a new sale. 556 F. 2d at 470. Hence the Tenth Circuit held Phillips to be an assignee under local property law, subject to the encumbrances, including interstate service, placed on the leasehold interest by the lessee. *Id.* As the Tenth Circuit noted, this decision is entirely consistent with the holding of the Fifth Circuit in the present case. 556 F.2d at 470-471.

In short, AGD and Service Commission offer no valid reason why this case should not be seen for what it is: a case involving whether the lessee under a rare, fifty-year fixed-term lease could and did sell and dedicate to interstate service gas he did not own. On this legal issue, AGD and Service Commission raise no arguments and cite no authorities other than those relied on by the petitioners. Accordingly, their motions for leave to file amicus briefs should be denied.

Respectfully submitted,

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